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## **‘Voice’ and ‘Choice’ in Modern Working Practices: Problems with the Taylor Review**

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### **Abstract:**

In July 2017, the Taylor Review on ‘Modern Working Practices’ was published. Led by Matthew Taylor, the Review aimed to consider the implications of new emerging business models for both worker rights and employer obligations. Its recommendations seem ill-informed, methodologically unsound and, ultimately, unlikely to address the widespread deprivation of workers’ rights within the ‘gig’ economy and contemporary workplace. We shape our critique of the Taylor approach by reference to the constructions of ‘choice’ used in the Review and the limited scope permitted for worker ‘voice’. In particular, we observe an evasion of international labour standards relevant to ‘decent work’ and a lack of attention to fundamental human rights. Identifying methodological flaws in the Report and focusing on three central areas of reform: employment status; zero hours contracts; and workers’ voice and representation, this article critically analyses a number of the proposals put forwards, concluding that many of the Taylor Review recommendations are not only problematic, but dangerous, with potentially serious deregulatory repercussions for UK workers if actioned upon and implemented by the current Government.

### **1. AN INTRODUCTION TO THE AIMS AND FINDINGS OF THE TAYLOR REVIEW ON CHOICE AND VOICE**

In July 2017, the Taylor Review’s Report on ‘Modern Working Practices’<sup>1</sup> was published. This followed the appointment of Matthew Taylor in October 2016 to conduct a review of how employment practices should change to ‘keep pace with modern business models’.<sup>2</sup> Indications

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<sup>1</sup> Matthew Taylor, ‘Good Work; The Taylor Review of Modern Working Practices’ (Gov.uk, 2017) available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf) accessed 26 September 2017 (The Taylor Review).

<sup>2</sup> See <https://www.thersa.org/about-us/media/2016/matthew-taylor-to-lead-independent-review-of-employment-practices-in-the-modern-economy> accessed 26 September 2017.

were that the Conservative Government under Theresa May wished to support a ‘diverse ecology’ of such business models, while acknowledging the potential for regulating new forms of work. To this extent, the Review was concerned with the emergence of the ‘gig economy’, where workers are hired through virtual ‘platforms’ to provide services, as is the case with controversial businesses ‘Uber’ and ‘Deliveroo’.<sup>3</sup>

Notably, in 2016, cases concerning the employment rights of ‘gig economy’ and other apparently self-employed workers were beginning to come before the courts. Further, a number of high profile political campaigns on precarious work had gathered momentum, focussing on such matters as: the extensive use of ‘zero hours’ contracts in the retail sector,<sup>4</sup> the appalling terms and conditions of employment in the care sector;<sup>5</sup> the more general rise in wage inequalities, and in-work poverty.<sup>6</sup> In the face of these seismic political pressures, Theresa May’s Government sought to reposition itself as the vanguard of a new form of Conservative ideology which appreciated the concerns of British workers. Accordingly, the Government announced the ‘Independent Review of Employment Practices in the Modern Economy’, outlining six key themes for the Review to consider, including: security, pay and rights; progression and training; the balance of rights and responsibilities; representation; opportunities for under-represented groups; and new business models.<sup>7</sup>

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<sup>3</sup> Valerio De Stefano, *The Rise of the ‘Just-in-Time Workforce’: On-demand work, crowd work and labour protection in the ‘Gig-Economy’* ILO Working Paper [http://www.ilo.org/travail/whatwedo/publications/WCMS\\_443267/lang--en/index.htm](http://www.ilo.org/travail/whatwedo/publications/WCMS_443267/lang--en/index.htm) accessed 26 September 2017.

<sup>4</sup> BIS Select Committee, *Employment Practices at Sports Direct: Third Report of Session 2016-17* (available at [http://www.publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf?utm\\_source=219&utm\\_medium=module&utm\\_campaign=modulereports](http://www.publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf?utm_source=219&utm_medium=module&utm_campaign=modulereports)) accessed 26 September 2017; Doug Pyper and Jennifer Brown, House of Commons Briefing Paper, *Zero-Hours Contracts* (April 2017), available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06553>

<sup>5</sup> Lydia Hayes, *Stories of Care: A Labour of Law. Gender and class at work* (London: Palgrave, 2017).

<sup>6</sup> Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Inequality* (London: Institute of Employment Rights, 2014): <http://classonline.org.uk/pubs/item/trade-unions-and-economic-inequality> accessed 26 September 2017; Adam Tinson et al, *Monitoring poverty and social exclusion 2016*, Report for the Joseph Rowntree Foundation available at: <https://www.jrf.org.uk/report/monitoring-poverty-and-social-exclusion-2016> accessed 26 September 2017. For mapping of these global trends, see Thomas Picketty, *Capital in the 21<sup>st</sup> Century* (Harvard University Press, 2013).

<sup>7</sup> Gov.uk, ‘Employment Practices in the Modern Economy’ <https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy> accessed 26 September 2017.

Interestingly, there are a number of significant omissions in the Government's six themes for review, particularly in relation to those issues affecting industrial relations- a concerning oversight for a Review centred on the 'relationship between those who hire, employ and manage on the one hand, and those whose services they employ on the other'.<sup>8</sup> For example, British exit of the European Union (Brexit) was clearly not included in the Government's terms of reference, although the result of the referendum had been announced and the loss of coverage by EU social policy was likely to have a significant effect on workers. Associated issues around immigration, which were heavily focused on in the Brexit White Paper,<sup>9</sup> were also not mentioned. Similarly, there was no reference to the Trade Union Act 2016 and its implications for a representation gap, despite apparent concern with 'under-represented groups' such as careworkers or those with disabilities. Instead, the Review's interest lay in 'alternative forms of representation around the world',<sup>10</sup> such as 'the Freelancers Union in New York which focuses on access to health insurance, or the California App Based Drivers Association which lobbies companies like Uber on behalf of drivers'.<sup>11</sup>

The final Report of the Taylor Review does acknowledge various contemporary challenges for the UK labour market, including: poor real wage growth, poor productivity, and skills shortages alongside the confusion caused by the introduction of 'new business models' such as the 'sharing' and 'gig' economies, as well as the potential for further automation.<sup>12</sup> However, the Review seems to have taken seriously its mandate to remain silent on collective voice in the form of trade union representation and Brexit. Further, it is shockingly weak on what were, at the time, glaring barriers to access to justice. As the publication of the Taylor Report precedes the issue of the Supreme Court decision in *UNISON*,<sup>13</sup> the timidity of the 'Review team' on employment tribunal fees is put to shame. In relation to those challenges that are acknowledged, the Taylor Review's responses are blunted by a high degree of satisfaction

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<sup>8</sup> The Taylor Review n.1 above, at 7.

<sup>9</sup> See Policy paper, 'The United Kingdom's exit from, and new partnership with, the European Union' (2017), chs 5 and 7 available at <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2#protecting-workers-rights> accessed 26 September 2017.

<sup>10</sup> See n.2 above.

<sup>11</sup> Ibid.

<sup>12</sup> The Taylor Review n.1 above, at 30-31.

<sup>13</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, Supreme Court (SC).

with the workings of the current labour market, which is described as ‘the British way’, a concept which will be interrogated later in the article.<sup>14</sup>

Though many commentators have responded to the Taylor Report,<sup>15</sup> there has been so far little academic analysis of the Report’s proposals. In part, this is likely due to widespread resistance in providing the Review with a platform, or giving the recommendations much prominence. Whilst we acknowledge these concerns as valid, we felt it necessary to address some of the proposals put forwards in the Taylor Review on grounds that, if implemented, they could have serious deregulatory repercussions for UK workers. Of additional significance are the proposals now made by the joint Work and Pensions and Business, Energy and Industrial Strategy Committee Report (the Parliamentary committees’ report), which having taken oral evidence from Matthew Taylor, seeks to pursue many of his suggestions in recommendations for legislation.<sup>16</sup>

As a result, the remainder of this article will critically analyse a number of the central recommendations made by the Taylor Review, beginning with the overarching neo-liberal narrative of ‘choice’ and ‘voice’ which seems to have shaped many of the Review’s findings and recommendations. The second section of this article addresses the methodological issues raised by the Taylor Review, including membership of the review team and issues over evidence, explaining why we see these as flawed and misguided. We then move to an examination of three key facets of the Taylor Report, insofar as they relate to the issues of choice and voice. The first is the treatment of employment status, which can be linked to the ‘choices’ available to those engaged in work. The second is the one-sided flexibility presented by zero-hours contracts which the Taylor Review seeks to preserve, once again promoting

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<sup>14</sup> The Taylor Review n.1 at 7.

<sup>15</sup> See for example from the Centre for Labour and Social Studies (CLASS): <http://classonline.org.uk/blog/item/class-response-to-the-taylor-review-of-modern-working-practices-an-opportun> accessed 26 September 2017; also CIPD at: [https://www.cipd.co.uk/Images/taylor\\_review\\_submission\\_final\\_tcm18-25506.pdf](https://www.cipd.co.uk/Images/taylor_review_submission_final_tcm18-25506.pdf) accessed 26 September 2017.

<sup>16</sup> Work and Pensions Committee, ‘Taylor Review of Modern Working Practices inquiry’ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/inquiry1/> accessed 26 September 2017. See House of Commons Work and Pensions and Business, Energy and Industrial Strategy Committees, *A Framework for Modern Employment*, Second Report of the Work and Pensions Committee and First Report of the Business, Energy and Industrial Strategy Committee of Session 2017–19, HC352, published 20 November 2017 (hereafter Parliamentary committees’ report): <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/352/352.pdf> accessed 11 December 2017.

flexibility while appearing deferential to workers' preferences. Finally, we further examine the limited role envisaged for 'voice' in the contemporary workplace, which overlooks international labour standards and fundamental rights.

### *On choice and voice*

Neo-liberal constructions of 'choice' and 'voice' will be familiar to those who recall Matthew Taylor in his role as Director of Tony Blair's 'New Labour' No. 10 Policy Unit and the White Paper on *Fairness at Work*.<sup>17</sup> In ways similar to the 1998 White Paper, the Taylor Report draws a picture of those in 'jobs' desiring and exercising individual 'choices', which legislation ought to facilitate rather than obstruct - to the extent that this is also good for business.<sup>18</sup> We can see the origins in New Labour of the terms used, including the heavy policy emphasis on 'productivity' and 'partnership'.<sup>19</sup>

Unsurprisingly, then, one of the guiding principles of the Taylor Review is that 'individuals should be able to decide'.<sup>20</sup> They will be given options to make 'trade-offs', for example between the more secure employment status of 'employee' or the lesser option of being a 'dependent contractor' (to replace the term 'worker').<sup>21</sup> The person offering their labour could also choose instead to be a properly 'independent contractor', but if they do so, for fiscal reasons, their tax liability will be increased and their social security options increased.<sup>22</sup> Of course, this legislative and governmental construction of the consequences of choice is significant. But what is overlooked is how the putative worker's options are pre-determined, not only by government, but by the construction of labour markets in accordance with employers' interests. There is no acknowledgement that most terms and conditions are not capable of being negotiated (especially in the absence of collective bargaining), but are presented in the form of standard form contracts, this being how 86% of zero hours contracts are concluded.<sup>23</sup> Instead, it seems likely that such contracts will continue to be presented on a

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<sup>17</sup> Fairness at Work White Paper, Cm 3968 (1998).

<sup>18</sup> The Taylor Review n.1 above at 33.

<sup>19</sup> Ibid. See chapter 13, in particular.

<sup>20</sup> Ibid., at 15.

<sup>21</sup> Ibid., at 35 et seq.

<sup>22</sup> Ibid., ch 10 discussed further below.

<sup>23</sup> See CIPD, Zero-hours and short-hours contracts in the UK: Employer and employee perspectives (2015) available at: [https://www.cipd.co.uk/Images/zero-hours-and-short-hours-contracts-in-the-uk\\_2015-employer-employee-perspectives\\_tcm18-10713.pdf](https://www.cipd.co.uk/Images/zero-hours-and-short-hours-contracts-in-the-uk_2015-employer-employee-perspectives_tcm18-10713.pdf) accessed 26 September 2017.

take it or leave it basis. In this, the approach of the Taylor Review seems to mark a significant retreat from the approach of the UK courts. Indeed, the ways in which worker agency is constrained by the power of employers in the workplace is largely glossed over, apart from the occasional quote from those consulted.<sup>24</sup> Abuse of power is treated as an issue for the most vulnerable rather than inevitable in the context of employment (or endemic in the labour market). In this respect, it is very similar to the analytical approach taken in the Policy Exchange paper that preceded the Trade Union Act 2016 – locating the problem of abuse in discrete and unusual situations of employer monopsony power, rather than intrinsic to the employment relation as such.<sup>25</sup>

While differences in the workforce and gender issues are mentioned, the differential nature of the costs of ‘choices’ for particular groups of workers are neglected. For example, in relation to women, while discrimination linked to pregnancy and maternity is identified as a problem,<sup>26</sup> there is no proposal in the Review to introduce further legislative measures. This is because it is said to be in the interests of business to treat women well, which employers can themselves be expected to appreciate. This is despite extensive evidence from the EHRC that employers do not act on this appreciation and the situation is urgent. Only if further guidance does not have any effect, is statutory intervention contemplated in the Taylor Review.<sup>27</sup>

The Taylor Review also identifies ‘voice’ throughout the Report as one of the constituent elements of ‘quality’ work. In chapter 3, this is defined as ‘consultative participation & collective representation’ which includes, *inter alia*, ‘direct participation..., consultative committees-works councils, union presence, union decision-making involvement’.<sup>28</sup> The discussion and specific proposals on voice are then set out in chapter 7 on ‘Responsible Business’, where the rationales for collective voice are considered and limited in their circumference. They are taken to consist of: feedback for the employer; an opportunity for a workforce to discuss common issues affecting them; a safe route to raise concerns; and an ability to hear and affect strategic decisions.<sup>29</sup> There is no acknowledgement of the ways in which collective bargaining can affect the standard superiority of an employer’s bargaining

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<sup>24</sup> The Taylor Review n.1 above, 26 – 27 where Citizens Advice Newham raise concerns regarding how workers experience their choices being constrained.

<sup>25</sup> Michael Ford and Tonia Novitz, ‘Legislating for Control: The Trade Union Act 2016’ (2016) 45(3) *ILJ* 277 at 279 – 281 and Alan Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45(3) *ILJ* 299 at 301-2.

<sup>26</sup> The Taylor Review, n.1 at 96-7.

<sup>27</sup> *Ibid.*, at 95.

<sup>28</sup> *Ibid.*, at 13.

<sup>29</sup> *Ibid.*, at 51-2.

power. There is no recognition of an entitlement of workers to seek a greater share of the profits of a business to be reflected in their wages. Hence the focus is on the Information and Consultation of Employees Regulations 2004 (ICER)<sup>30</sup> and corporate transparency. In other words, as in the *Fairness at Work White Paper*, trade union representation is merely one among many ways in which to further collective voice; its particular advantages for workers are neglected.<sup>31</sup>

## 2. THE QUESTIONABLE MEMBERSHIP AND METHODS OF THE TAYLOR REVIEW

In October 2016, the Royal Society of Arts (of which Matthew Taylor is CEO) proudly announced his leadership of the Review. For example, Vikki Heywood, RSA Board of Trustees Chairman, considered that:

the decision to invite Matthew to chair the inquiry is a testament to the breadth and quality of the RSA's research and impact in recent years on the future of work, self-employment and the platform economy. It also reflects the significant value placed in the RSA's methodology, which prioritises analysis of the first-hand experiences of people across the country.<sup>32</sup>

A further three experts were appointed to join him to hear a range of evidence at various meetings and online. We, however, take issue with the membership and methods of the Review, which do not compare favourably with past attempts to engage with the immense challenges of labour relations and their regulation.

Given the political backdrop, the Taylor Review panel were invited to undertake a task of profound national significance, reminiscent of the task befalling the Royal Commission on Trade Unions and Employers Association which produced what is commonly known as the 'Donovan Commission Report' back in 1968.<sup>33</sup> Of course, the problems under examination in the Donovan Commission Report were very different to the ones before us now. Nevertheless, in terms of political importance of matters of work in the public sphere, we believe that there

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<sup>30</sup> Ibid.

<sup>31</sup> Tonia Novitz and Paul Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999* (Oxford: Hart, 2001).

<sup>32</sup> See n. 2 above.

<sup>33</sup> *Royal Commission on Trade Unions and Employers' Associations 1965 – 1968 Chairman: The Rt Hon. Lord Donovan Report, Presented to Parliament by Command of Her Majesty June 1968 – the Donovan Commission Report* (London: HMSO, 1968).



are strong parallels. This was our ‘Donovan’ moment. In methodological terms, how does ‘Donovan’ compare with ‘Taylor’?

### *Membership*

With regards to membership there are a number of striking differences. The first is the composition of the two review bodies. Donovan consisted of twelve eminent experts drawn from a range of academic disciplines, ‘stakeholders’, and political sympathies. This included Professor Otto Kahn-Freund and Professor Hugh Clegg. By contrast, the Taylor review team is much smaller and less diverse in terms of its expertise. Matthew Taylor’s history as an enthusiast for New Labour policy was identified above. The others engaged in the ‘Review team’ consisted of: Greg Marsh (previously CEO of Onefinestay<sup>34</sup> sold to Accor in 2016); Diane Nichol (a partner in Pinsent Masons specialising in employment law); and Paul Broadbent (the new head of the Gangmasters Licensing Authority, previously assistant chief constable of Nottinghamshire police). The absence of any academic membership chimes with the suspicion of ‘experts’ recently expressed by Michael Gove and applauded by others.<sup>35</sup> Nor were there any ‘representatives’ of trade unions as there had been in the Royal Commission (Lord Collison and George Woodcock).

### *The evidence*

No independent research was undertaken by or for the Taylor Review team. Bill McCarthy (later Lord McCarthy), as ‘Research Director’, oversaw the preparation and publication of research papers for the Donovan Commission.<sup>36</sup> By way of contrast, the Taylor Review makes reference to the theoretical framework for one EU Horizon 2020 Project, without

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<sup>34</sup> Onefinestay.com is an online service which enables access to luxury accommodation – a platform-based business.

<sup>35</sup> ‘Britain has had enough of experts says Gove’ Financial Times, 3 June 2016 available at: <https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c>. See also for reaction, <http://www.telegraph.co.uk/news/2016/06/10/michael-goves-guide-to-britains-greatest-enemy-the-experts/>.

<sup>36</sup> The Donovan Commission Report (1968) at 3, para. 12 which also discusses the hundreds of questionnaires and interviews on the basis of which the research papers were compiled.

acknowledging that it is still continuing and has yet to provide conclusive findings.<sup>37</sup> Moreover, unlike the Donovan Commission, there has been no publication of proceedings ('the public hearings around the country' to which the 'Foreword by Matthew' refers),<sup>38</sup> transcripts of oral questioning of witnesses, submitted written evidence, and additional or dissenting notes from individual members. It is therefore not possible to compare the recommendations to the views of the public or assess preponderance of opinion on key issues in the Taylor Report.

These differences are reflected starkly in the depth and ambition of the respective documents. Donovan resulted in a document of over 350 pages, setting out a detailed institutional map of British industrial relations as a basis for specific reform proposals across the range of collective and individual employment law. It has been an enduring contribution to the scholarly and policy literature on industrial relations, and it continues to be used as a reference point today. By contrast, the Taylor Review took less than a year to complete, producing a series of proposals focused predominantly on individual employment law and practice. This is contained in a glossy document of just over 100 pages that is heavy on proposals but very light on original analysis informed by evidence-based policy making. Although it is early to assess, we do not think that the Taylor Review will become an enduring feature of the disciplinary canon given its rather muted reception to date.

The Taylor Review also proceeds on contradictory assumptions regarding the role for legal norms in performing a regulatory and steering function in labour markets. In relation to pregnant workers,<sup>39</sup> for example, the scope for further legislation is regarded as limited in line with the 'third way' notion of legal standards as 'reflexive' and amenable to modification in order to suit the preferences of employers in particular organisational contexts.<sup>40</sup> None of the large body of theoretical or empirical research on effective regulation is cited in support of this view, which is simply treated as part of the obvious common sense of the Review members. We regard this failure to engage in evidence-based policy-making as unacceptable in a review of this kind. It is also remarkable how this preference for 'light regulation' operates alongside a governmental preference for heavy legal intervention through primary legislation in the Trade Union Act 2016 and the Immigration Act 2016; nor is it clear why legislative intervention to

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<sup>37</sup> Described as the 'QuinnE' model of job quality (at 12 and fn. 3), this seems to be a single EU-funded Horizon 2020 project which only concludes in March 2018. See <http://quinne.eu/> accessed on 26 September 2017.

<sup>38</sup> The Taylor Review, n.1 above at 5.

<sup>39</sup> Ibid., at 95 – 97.

<sup>40</sup> See P L Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP, 2007).

create a new legal category of ‘dependent contractors’ would be helpful. The Taylor Review did not explore this disjunction.

*A lack of international or comparative perspective*

The endorsement of the ‘British Way’ in the Taylor Review is adopted with remarkably little reference to comparative experience or comparative scholarship on employment relations and the regulation of work. This no doubt reflects a lack of any comparative expertise amongst the expert members of the Taylor Review (the Donovan Commission was fortunate to have the contribution of the great comparatist, Professor Otto Kahn-Freund).

This nativist preoccupation with a ‘British way’ blocks out the scope for comparative learning. For example, it might have been interesting to learn from recent New Zealand legislation addressing ‘zero hours’ contracts.<sup>41</sup> It might also have been interesting to learn from German experience with works councils and codetermination, and the symbiotic linkages between collective bargaining structures and works councils. Instead, there is reference to the CBI’s enthusiasm for rating of the UK ‘as having the 5th most efficient labour market in the World Economic Forum’s Global Competitiveness Report 2016-17, behind only Switzerland, Singapore, Hong Kong and the United States’.<sup>42</sup> The scope for ‘job-creation’ generated by current forms of ‘flexibility’ is seen as beneficial, even if these jobs are often in precarious work or self-employment. This demonstrates astonishing complacency regarding the outcomes for British workers, including employment insecurity and under-employment. Indeed, the significance of international human rights standards for those at work receives no attention. The work of the Equality and Human Rights Commission is only mentioned briefly on two occasions towards the tail end of the Taylor Review.<sup>43</sup>

The goal stated in the Taylor Review is that of ‘good work for all’.<sup>44</sup> This should align with the notion of ‘decent work’ advocated by the International Labour Organisation (the ILO), a United Nations agency of which the UK is a longstanding member (since 1919). However, it does not do so. The Review represents a troubling political habit in the UK of invoking

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<sup>41</sup> See <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/addressing-zero-hour-contracts> accessed 26 September 2017.

<sup>42</sup> The Taylor Review, n. 1 above at 17.

<sup>43</sup> Ibid., at 94 and 107.

<sup>44</sup> Ibid., at 7.

terminologies with a specific normative resonance in international law, then detaching the terminologies from that content in domestic application.<sup>45</sup> According to the ILO Declaration on the Social Dimensions of Globalization 2008, the four ‘pillars’ of ‘decent work’ are to be understood as standards and rights at work, creation and enterprise development, social protection and social dialogue. These are seen as ‘inseparable, interrelated, and mutually supported’. Unpacked in Article IA of the 2008 Declaration they include ‘developing and enhancing measures of social protection, social security and labour protection’ but also ‘promoting social dialogue and tripartism’. In particular, this instrument observes that ‘freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives...’ In the Taylor Review, a quotation from the CIPD submission makes reference to ‘the ILO Decent Work construct’,<sup>46</sup> but otherwise the extensive work of the ILO, including its protection of fundamental principles and rights at work and even its current exploration of ‘The Future of Work’ including the gig economy,<sup>47</sup> is not mentioned in the Taylor Review. The Review’s determination to ignore the compliance of UK law with international standards regarding collective bargaining, freedom of association, and the right to strike, is evident.

This reinforces our view that the deployment of the ‘British way’ is a dangerous form of discourse that is isolationist in its disregard of binding international and European labour standards. This is reflected, for example, in the Taylor Review’s proposal to reinstitute ‘rolled up holiday pay’,<sup>48</sup> an abusive and exploitative practice that is regarded by the European Court of Justice as a breach of a fundamental social right.<sup>49</sup> It is difficult to know whether the Review panel was simply unaware that it was proposing a reform that breached European law or whether this recommendation reflects a lack of respect for promises to respect European employment rights after Brexit. In any case, it is a very concrete example of the flaws which follow from focus on a ‘British way’.

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<sup>45</sup> See, for example, reference to ‘essential’ and ‘important’ services in TUA 2016 discussed by Michael Ford and Tonia Novitz, ‘An Absence of Fairness... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44(4) *Industrial Law Journal* 522; and Ruth Dukes and Nicola Kountouris, ‘Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45(3) *Industrial Law Journal*, 337.

<sup>46</sup> The Taylor Review n.1 at 104.

<sup>47</sup> See <http://www.ilo.org/global/topics/future-of-work/lang--en/index.htm> accessed 26 September 2017.

<sup>48</sup> The Taylor Review n.1 at 47.

<sup>49</sup> *Robinson-Steele v R. D. Retail Services* [2006] EUECJ C-257/04

### 3. EMPLOYMENT STATUS AS A MATTER OF ‘CHOICE’

Employment status is one of the central areas of reform identified by the Taylor Review which considers the current status framework ‘difficult to understand’ and confusing for both workers and employers. Those working in atypical ways (such as Uber drivers who use app technology to engage in the labour market) are seen as particularly disadvantaged by the current system which fails to address the needs of people working outside of the traditional employment law model.<sup>50</sup>

Though there are some positive proposals within the Taylor Review, such as the recommendation to extend the right to written particulars to workers<sup>51</sup> or a presumption in favour of ‘worker’ status,<sup>52</sup> there are notable omissions throughout the report. Specifically, the lack of analysis relating to employee status and the issues caused by mutuality of obligation reflects the broad-brush nature of the Taylor Review which overlooks pressing issues in favour of unnecessary and impractical proposals. The primary proposals put forwards in the Taylor Review’s section on status relate to: the codification of status in legislation; changes to worker status; and the alignment of tax status with the employment status framework.

#### *Codifying employment status tests in legislation*

The Taylor Review emphasises that determination of employment status should be clear and simple, providing employers and workers with a degree of certainty (and choice) with regards to their rights and obligations, an aim which few would disagree with. Yet the Report suggests that the best way of achieving this is to include definitive employment tests and an outline of their principles in legislation. The difficulty with this approach is the assumption that it is possible to crystallise a simple set of factors, without broader recourse to the societal conventions and complex evolution of legal rules which reflect normative (and political) judgements regarding the regulation of work. Difficult questions about the ‘boundary’ between employees/workers and the self-employed are as old as labour law itself. The persistence of these questions does not represent a lamentable failure of intellectual capacities. The questions persist because the drawing of the boundary represents political and normative choices about the balance between autonomy and social protection. This is likely to always be a site of

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<sup>50</sup> The Taylor Review n.1 at 26.

<sup>51</sup> Ibid., 39.

<sup>52</sup> Ibid., 61-2.

political contestation. We must emphasise that the questions do *not* persist because regulators are too dense to discern these natural boundaries of segmentation ‘out there’ in the world. When Taylor calls for ‘clarity’, it is important to keep this distinction between the ‘descriptive’ and the ‘normative’ fully in view. The Taylor Review seeks to neglect this political dimension to the work boundary, as becomes evident when more closely examining the outcome of the proposals made.

At present, tests developed through the common law are used to define employment status on grounds that employment relationships are often complex, circumstantial and subject to continuous development in line with economic demand. The complexity of the employment relationship is reflected in the evolving case law and status tests which are modified to accommodate new and complex relationships, such as those in the case of *Pimlico Plumbers v Smith*<sup>53</sup> and *Aslam v Uber*.<sup>54</sup> Defining employment status tests (such as control, mutuality of obligation and personal service) within legislation and providing a key outline of their principles would likely limit the scope of the courts in dealing with novel situations which do not fit a tick box exercise.

Given the complexity of employment relations, drafting the legislation would also be an extremely difficult task, even for the best of Parliamentary draftsmen. As amended legislation would remain subject to interpretation by the courts, it is unclear why legislative change is regarded as necessary rather than guidance for employers and workers using the established case law. Given the potential uncertainty this recommendation could cause, we would regard such legislative change as impractical. The concept of an ‘employee’ is not what philosophers would call a ‘natural kind’ concept, like ‘tiger’ or ‘cobalt’;<sup>55</sup> and there are dangers inherent in the simplistic list type approach set out in the Parliamentary committees’ report and draft Bill issued subsequently.<sup>56</sup> There is not a biometric protocol, or even a fancy App, that can crystallise what an ‘employee’ is through methods of scientific enquiry. It is a category created by the law which is then used to distribute rights and entitlements across different work relations. The preoccupation with ‘clarity’ through legislated definitions portrays the relevant task as descriptive rather than normative, and this risks de-politicising the debates around employment status. The collaborative interaction between courts and Parliament, as reflected

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<sup>53</sup> [2017] EWCA Civ 51 (CA).

<sup>54</sup> [2017] IRLR 4, ET; upheld in *Uber v Aslam & ors* UKEAT/0056/17/DA, 20 November 2017.

<sup>55</sup> Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard UP, 2006) 10-12.

<sup>56</sup> Parliamentary committees’ report n.16 above, ‘Draft Bill’, clause 1.

in some recent and progressive UK Supreme Court jurisprudence like *Autoclenz*,<sup>57</sup> is likely to deliver more effective protection to workers than the legislative changes suggested in the Taylor Review and the subsequent Parliamentary committee report.

Emphasis upon the lack of legal clarity regarding employment status also overlooks the central issue regarding employment protection and the ability to claim rights which is primarily attributed to the lack of effective enforcement mechanisms within UK labour law. As noted by numerous commentators, even the clearest of legal protections will not result in employer compliance or respect for workers' rights if those protections never result in legal proceedings.<sup>58</sup> This extends not only to the issue of tribunal fees (as rectified by the judgment in *UNISON*)<sup>59</sup> but also to the lack of enforcement by HMRC regarding national minimum wage investigations and the dwindling funding provided to ACAS which is specifically designed to provide advice on workplace disputes (including issues of status and contract). As noted by Jason Moyer-Lee, the recommendation to implement punitive fines to deter unlawful behaviour on the part of employers was not accounted for in the Taylor Review which ignores the central issue of wilful non-compliance rather than ignorance regarding status on the part of some employers.<sup>60</sup>

### *Changes to worker status*

Perhaps the most radical proposals put forward by the Taylor Review regarding status are those on worker status (as set out in s230(3) Employment Rights Act 1996), including: changing the title of limb b workers (i.e. those workers that are not employees) to that of 'dependent contractors'; removing the requirement of personal service from the worker status test; placing greater emphasis on control in determining worker status; and introducing piece rate legislation for gig economy workers.<sup>61</sup>

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<sup>57</sup> *Autoclenz Ltd v Belcher* [2011] ICR 1157, SC. See, for discussion, Alan L. Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) *ILJ* 328.

<sup>58</sup> Bob Hepple, *Social and Labour Rights in a Global Context* (Cambridge: CUP, 2007); Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees [2017] 80 *Modern Law Review* 412

<sup>59</sup> See n.13 above.

<sup>60</sup> Jason Moyer-Lee, 'Wishy-washy and full of fluff – the Taylor review offers little' (the Guardian, 18 July 2017) <https://www.theguardian.com/commentisfree/2017/jul/18/taylor-review-gig-economy-workers> accessed 26 September 2017.

<sup>61</sup> The Taylor Review, n.1 above at 40.

The justification for changing the title of limb b workers to ‘dependent contractors’ rests upon distinguishing between those workers who enjoy both worker and employee status and those that are simply workers – limb b workers.<sup>62</sup> The Taylor Review notes that this distinction is confusing. Yet, we observe that amending the term ‘worker’, which is embedded in both the common law, legislation and guidance, would create unnecessary complication and further confusion. In addition, the term ‘dependent contractor’ denotes a degree of subordination which, at present, is not a necessary requirement for categorisation as a worker.<sup>63</sup>

The Taylor Review also proposes removing the requirement of personal service from the status test of worker on grounds that unscrupulous employers often utilise substitution clauses to classify workers as independent contractors to avoid the heightened accountability attached to worker status. The Report says that at present ‘an individual can have almost every aspect of their work controlled by a business, from rates of pay to disciplinary action and still not be considered a worker if a genuine right to substitution exists’.<sup>64</sup> This suggestion seems sensible following the recent 2017 case of the Independent Workers Union of Great Britain and Deliveroo<sup>65</sup> in which the Central Arbitration Committee held that ‘Roos’ were not workers due to the existence of an active, though not widely used, substitution clause, which thereby blocked their access to statutory trade union recognition.. It is however greatly concerning that, in place of the personal service test for worker status, the Taylor Review proposes greater emphasis on control within the working relationship. Control is already considered as part of the worker test (in deciding whether the individual works for a client or customer), yet while subordination to the employers’ control is an evidential aid to distinguishing between workers and independent contractors, it is not a *necessary* element. Indeed, in *Bates van Winkelhof v Clyde & Co*<sup>66</sup> Lady Hale explicitly rejects using the ‘mystery ingredient of “subordination”’ as definitive of worker status, noting there is not a ‘single key’ to unlocking the statute.<sup>67</sup> The case

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<sup>62</sup> Ibid., at 35.

<sup>63</sup> Cf. the controversy generated by *Jivraj v Hashwani* [2011] UKSC 40 which imported ‘subordination’ into the worker test under the equality legislation. See Mark Freedland and Nicola Kountouris, ‘Employment Equality and Personal Work Relations—A Critique of *Jivraj v Hashwani*’ (2012) 41(1) *ILJ* 56. The importation of ‘control’ was subjected to a powerful critique by Freedland and Kountouris, given its restrictive effects on the scope of protection in discrimination law.

<sup>64</sup> Ibid., at 36.

<sup>65</sup> *Independent Workers’ Union of Great Britain (IGWB) and RooFoods Limited TA/ Deliveroo*, Central Arbitration Committee 14 November 2017 (TUR1/985(2016)).

<sup>66</sup> [2014] ICR 730 (SC).

<sup>67</sup> Ibid., para.39 (Lady Hale).



law thereby conflicts with the Review's suggestion that emphasising control would not require 'a significant departure from the approach currently taken by the courts'.<sup>68</sup>

Aside from the nebulous meaning of 'control', which would likely cause confusion amongst employers and workers seeking clarity, adopting the control test as determinative of worker status would have numerous disadvantages. It would exclude those in shareholding companies who at present can effectively be one's own boss and still be a 'worker',<sup>69</sup> and it may also cause issues for professionals who are granted a degree of independence in performing their duties, as per the considerations taken into account by the Court of Appeal in *White v Troutbeck*.<sup>70</sup> For agency workers who are often directly controlled by the end user rather than the agency, placing greater emphasis on control could also cause serious complications<sup>71</sup> as well as confounding the situation for individuals on zero-hour contracts who can accept or reject work at their choosing. This is particularly significant following the case of *Windle v Secretary of State for Justice*<sup>72</sup> where the Court of Appeal controversially upheld a tribunal ruling that court interpreters were not employed for the purposes of the Equality Act 2010. In this case the 'zero hours' clause within the claimant's contracts (which allowed them to accept or reject work at their choosing) was considered relevant to whether they were in a subordinate position whilst working. As a sufficient degree of control has also been identified as a necessary element for employee status, there is further risk that introducing the control test for category b workers would create greater levels of uncertainty by destabilising the boundary between 'employee' and 'worker'. This could in fact lead to a contraction in the scope of the 'employee' concept, with deregulatory effects. In this context, further proposals concerning the creation of an 'online tool' for determination of employment status and the proposed reversal of the burden of proof in favour of the putative worker would be unlikely to create individual justice (or autonomy) for those at work. Indeed, it may be that the 'purposive' approach in *Autoclenz*<sup>73</sup> is similar in effect to a modification of the burden of proof.

In addition to changing the status test for workers, a further proposal which raises significant concern is the introduction of piece rate legislation for those working in the gig economy. On this basis, platform employers such as Uber could compensate workers based on the number of tasks performed provided that such businesses can demonstrate that 'an average

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<sup>68</sup> The Taylor Review, n. 1 above at 36.

<sup>69</sup> Again, see *Bates van Winkelhof v Clyde & Co* n.66 above.

<sup>70</sup> [2013] EWCA Civ 1171.

<sup>71</sup> *Bunce v Postworth Limited Trading as Skyblue* [2005] EWCA Civ 490.

<sup>72</sup> [2016] EWCA Civ 459.

<sup>73</sup> See n. 57 above.

individual, working averagely hard, successfully clears the National Minimum Wage with a 20% margin of error'.<sup>74</sup> Indeed this concern is raised by the general secretary of the Independent Workers' Union which represents couriers and drivers (including the former lead claimants in the *Uber* case)<sup>75</sup> who states that this 'would be a dream come true for the likes of Uber, and a massive step backwards'<sup>76</sup> as the current case law clearly states that Uber drivers are entitled to the national minimum wage for the time in which they work. Such a proposal could therefore undo the work of the Employment Tribunal and Court of Appeal in recognising gig economy workers as 'workers', thereby entitling them to the national minimum wage.<sup>77</sup>

### *Aligning tax and employment status*

One of the Taylor Review's final recommendations on status relates to tax, noting that 'effort should be made to align the employment status framework to that of the tax status framework'.<sup>78</sup> Accordingly, being employed for tax purposes should mean that you are either an employee or a worker.

At present the tax framework distinguishes only between employees and independent contractors which means limb b workers can fall into either category depending on their circumstances. The test for establishing 'employee' tax status is set out in section 4 of the Income Tax (Earnings & Pensions) Act 2003 which broadly follows the statutory employment test in section 230(2) of the Employment Rights Act 1996. As such it is logical that this definition be expanded to include the status of worker. However, what remains interesting in the Taylor Review is the attempt to consider how the tax regime can incentivise 'choice' regarding classification as either an independent contractor, a worker, or an employee. In chapter nine, for example, Taylor proposes that the National Insurance system should be neutralised so that independent contractors pay the same rate as those who are employees, reducing the incentive for employers to use 'flexible workers' whenever possible. In this sense, it might seem that the incentive to be self-employed is reduced. However, in return, the self-

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<sup>74</sup> The Taylor Review, n.1 above at 38.

<sup>75</sup> *Aslam v Uber* n.54 above.

<sup>76</sup> Jason Moyer-Lee, 'Wishy-washy and full of fluff – the Taylor review offers little' (the Guardian, 18 July 2017) <https://www.theguardian.com/commentisfree/2017/jul/18/taylor-review-gig-economy-workers> accessed 26 September 2017.

<sup>77</sup> See for e.g. *Aslam v Uber* n. 54 above; *Dewhurst v Citysprint*, ET, 5.1.17 (available on web at e.g. [http://www.egos.co.uk/ir35/cases/Dewhurst v City Sprint 2016.pdf](http://www.egos.co.uk/ir35/cases/Dewhurst_v_City_Sprint_2016.pdf)); and *Pimlico Plumbers v Smith* n.53 above.

<sup>78</sup> The Taylor Review n.1 above, at 38.

employed will be able to claim more in the way of state benefits (for e.g. regarding parental leave).<sup>79</sup>

We can see real advantages in this policy proposal for aligning tax and national insurance rules between employees and the self-employed as a regulatory prop to the standard employment relationship. Nevertheless, the Report also evinces a clear endorsement of the growth in self-employment practices, and a concern to legitimise those employment practices. The growing problem of exploitation in new forms of self-employment is not sufficiently addressed. The rather vague commitments in the Review to bolstering ‘voice’ and social protection for the self-employed, represents a missed opportunity. In effect, in its neo-liberal endorsement of a ‘choice’ paradigm, a legitimised option of ‘self-employment’ may represent a legislatively prompted mechanism for ‘contracting out’ of the full suite of employment protections.

#### **4. ONE-SIDED FLEXIBILITY – THE PROBLEM OF ZERO HOURS (AND AGENCY WORK)**

Chapter 6 of the Taylor Review addresses what it calls ‘one-sided flexibility’, exemplified by those employed on zero-hours contracts (ZHCs), short-hours or agency contracts.<sup>80</sup> In March 2017 the Labour Force Survey reported that women made up the majority of those on ZHCs, while younger workers aged 16 to 24 are also over-represented.<sup>81</sup> This suggests that other constraints on their times or even forms of social stigma affect their ‘choice’ to take up this kind of work.

The issue, according to the Taylor Review, is that these ZHC workers often have to be available for work without any work being guaranteed, making it hard for them to manage financial obligations such as mortgages. To redress this unfairness, the Report makes five proposals, examined below. They are notable for their limited legal analysis, scant detail and, above all, timidity. It gives almost no attention to the problem of enforcement of existing rights

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<sup>79</sup> Ibid., at 72.

<sup>80</sup> The Taylor Review n.1 above, at 43.

<sup>81</sup> See

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/mar2017> accessed 26 September 2017.

in this sphere.<sup>82</sup>

ZHCs are part of a wider picture in which workers do not have fixed, guaranteed hours. The Office of National Statistics (ONS), using a definition of ZHCs as meaning contracts which permit workers to be offered no hours of work, estimates there are between 1.7 million and 900,000 workers employed on ZHCs, depending on whether employers or households are surveyed.<sup>83</sup> Both of these figures are almost certainly under-estimates.<sup>84</sup> Moreover, they ignore workers who have *some* hours guaranteed, even where these are minimal. For example, the recent enquiry into Sports Direct revealed employees who were only guaranteed 336 hours a year (amounting to less than nine weeks' work based on a 40-hour week),<sup>85</sup> and Santander recently offered contracts in which only 12 hours were guaranteed annually.<sup>86</sup>

At the outset, the Report misunderstands how some ZHCs operate. It asserts that 'in theory' individuals on ZHCs have the right to turn work down.<sup>87</sup> But, as the Sports Direct inquiry revealed, it is perfectly possible for workers to be engaged under contracts in which the employer guarantees no work in a particular week but the worker is *not* entitled to refuse it if offered.<sup>88</sup> Such arrangements amplify the unfairness identified in the report, and call for strong measures in response. The Report identifies the problem of workers wanting more hours of work<sup>89</sup> and poor real wage growth in the UK,<sup>90</sup> but fails to link these to 'flexible' working arrangements.

#### *A higher national minimum wage for non-guaranteed hours*

The first proposal is that the Low Pay Commission should 'consider' the impact of awarding a

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<sup>82</sup> Compare the report of the Director of Labour Market Enforcement, *United Kingdom Labour Market Enforcement Strategy - Introductory Report* (July 2017).

<sup>83</sup> See ONS, *Contracts that Do Not Guarantee a Minimum Number of Hours: May 2017*. Curiously, the Report relies only on the Labour Force Survey Data, based on household surveys, in its estimate of 900,000 workers on ZHCs and ignores the fuller data in the ONS surveys: see Report at 25 and footnote 22.

<sup>84</sup> For example, the data based on surveying businesses excludes contracts where no work was provided in the fortnight of the survey, and workers may not realise their contract allows them to be provided with no hours: see Pyper and Brown at n.4 above.

<sup>85</sup> See BIS Select Committee n.4.

<sup>86</sup> See <http://www.independent.co.uk/news/business/news/santander-one-hour-month-contracts-staff-zero-hours-plus-a7651921.html>

<sup>87</sup> The Taylor Review n. 1 above at 43.

<sup>88</sup> See n.4 above, at paras 13-14.

<sup>89</sup> The Taylor Review n.1 above at 20.

<sup>90</sup> *Ibid.*, at 28.

higher NMW rate for non-guaranteed hours. It falls short of recommending an *increase* in the rate of pay for additional hours. The aim is to ‘nudge’ employers into guaranteeing more hours, achieving a degree of fairness in one-sided flexibility. This is a classic example of the continuing influence of ‘Third Way’ regulatory thinking on the parameters of the Review and has also led to concrete proposals for a ‘pilot scheme’ in the subsequent Parliamentary committees’ report.<sup>91</sup>

The extent to which this proposal results in higher guaranteed hours, and hence improves workers’ ability to obtain mortgages and plan their financial affairs, is an empirical question, which requires research (and as noted above this was lacking in preparation for the Taylor Report). But, even on its own terms, such a measure will only incentivise those employers who pay at the level of the national minimum wage. This limited reach is inconsistent with the proposal’s logic: fairness requires *all* workers should receive enhanced pay for non-guaranteed hours.<sup>92</sup> By the same token, workers who must be available for work should be paid something for this.

### *Continuity of employment*

A well-known problem for workers on ZHCs is continuity of employment, necessary to accrue the rights to unfair dismissal or a redundancy payment. Typically, workers on ZHCs are employees while working<sup>93</sup> but any week when no work is done breaks continuity, unless one of the statutory ‘bridges’ in section 212 of the Employment Rights Act 1996 (ERA) applies, such as absence due to sickness or a ‘temporary cessation of work’. If no work is done in a week, it breaks continuity which is reset at zero.<sup>94</sup> As a result, workers on ZHCs often fail to accrue the relevant qualifying period of service. If, for example, they do not work in a week for family reasons, that week will not count towards continuity, none of the ‘bridges’ will apply, and when they return the clock returns to zero.

In a confusing section, the Report *appears* to make two proposals: (i) to increase the gap which breaks continuity from one week to a month and (ii) to consider widening the

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<sup>91</sup> Parliamentary committees’ report n. 16 above, at 11-12 and ‘Draft Bill’, clause 3.

<sup>92</sup> This is recognised in Article 4(2) of the European Social Charter of 1961, to which the UK is a signatory, requiring increased remuneration for overtime work (which is what, in effect, are non-guaranteed hours).

<sup>93</sup> Though cf. *Windle* discussed above at n.72.

<sup>94</sup> Employment Rights Act (ERA) 1996 s.210(4).

circumstances in which the statutory bridges apply.<sup>95</sup>

Increasing the minimum break period to one-month is superficially attractive and it is perhaps therefore not surprising that the proposal is adopted in its entirety by the subsequent Parliamentary committees' report.<sup>96</sup> However, the danger is that it will create an incentive on employers to engineer gaps of more than this length, thus exacerbating precisely the problem of unreliable, low income employment which the Taylor Review highlights. Changes to the statutory 'bridges', which the Review fails to specify, are equally vulnerable to such strategies. At the very least the law should make clear that continuity should continue to accrue whenever a worker takes statutory annual leave, which at present it fails to do.<sup>97</sup>

But there are other solutions to this particular 'Gordian knot'. The most radical is removing or greatly reducing qualifying periods. If, for example, the right not to be dismissed is an important social right, why should a worker need two years to accrue it? An alternative, simpler mechanism is that any week in which a person works *qua* employee counts towards continuity, and periods of non-employment do not break continuity at all: in effect, a ratchet mechanism.<sup>98</sup> However, the ongoing problem remains that if the contract states that the employee is casual as required and this is not a 'sham', then the employer can simply refuse to rehire at any time up to acquisition of the continuity requirements, for example, relating to unfair dismissal or redundancy.<sup>99</sup> If that factual scenario occurs, statutory continuity will not help and only a statutory provision applying 'umbrella contracts' could operate to offer genuine employment protection.<sup>100</sup>

### *Pay transparency for agency workers*

The third proposal concerns pay transparency of agency workers.<sup>101</sup> This issue is wider,

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<sup>95</sup> The Taylor Review n. 1 above, at 45-46 confuses (a) breaks in statutory employment with (b) the 'bridges', which are limited to 26 weeks and not one-month gaps as the Report appears wrongly to assume.

<sup>96</sup> Parliamentary committees' report n. 16 above, at 12-13, 'Draft Bill', clause 5.

<sup>97</sup> Sometimes this will be the effect of s.212(3)(c) of the ERA 1996 - see *Vernon v Event Management*, UKEAT/0161/07/LA. But the point needs to be made express.

<sup>98</sup> See Zoe Adams and Simon Deakin, *Re-regulating Zero Hours Contracts* (Liverpool: IER, 2014), at 33.

<sup>99</sup> Cf. *O'Kelly v Trusthouse Forte plc* [1983] ICR 728; and *Carmichael v National Power* [1999] ICR 1226, HL.

<sup>100</sup> Once again, this is a solution already envisaged by the courts: *Pulse Healthcare Ltd v Carewatch Care Services Ltd & 6 Others* UKEAT/0123/12/BA.

<sup>101</sup> Taylor Review n.1 above at 46.

because many workers have problems about understanding their pay. It is best dealt with by conferring a right on all workers to a written statement from day 1, including full details of pay, as proposed in chapter 5 of the Report.

### *Holidays and holiday pay*

The fourth proposal is the vexed issue of holidays and holiday pay. The Report identifies, first, the problem of agency and ZHC workers not being aware of their entitlements to paid annual leave or being afraid to take it. The only suggestion is to increase awareness of the right - a timid proposal which would be better addressed by increased state-backed enforcement and penalties.<sup>102</sup>

Instead the Report proposes two small changes, both of which are poorly thought out. The first is to change the pay reference period used for calculating holiday pay from 12 weeks to a year. Holiday pay under the Working Time Regulations is meant to equate to pay while working, to ensure no disincentive to take annual leave.<sup>103</sup> To that end, the European Court of Justice says national courts should base it on an average over a representative reference period. A 52-week period will fail to do this. Work, after taking account of 5.6 weeks' annual leave, isn't done over 52 weeks but 46.4. More fundamentally, the proposal risks workers receiving less in respect of annual leave than they would earn if working during the relevant week. Suppose, for example, a ZHC worker takes holiday during a period of high demand, when if working he would be given many supplementary hours. The proposal thus risks exacerbating the unfairness in the relationship, as well as breaching EU law.

The second proposal is to allow workers to have the 'choice' of rolled up holiday pay. The danger of rolled up holiday pay, which is unlawful under EU law, is that a worker receives no real supplement to wages for holiday and has an incentive not to take annual leave.<sup>104</sup> These problems are especially acute for workers in precarious positions, such as those on ZHCs. Once again, the Report ignores these fundamental issues which detract from important social rights.

### *The right to request direct employment and fixed hours*

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<sup>102</sup> The Director of Labour Market Enforcement is consulting on this: see *Informing Labour Market Strategy 2018-19: Summary of Issues*.

<sup>103</sup> See *Lock v British Gas* [2014] ICR 813.

<sup>104</sup> See *Robinson-Steele v RD Retail Services* [2006] ICR 932.

The final proposals reflect the same timidity. After 12 months working for an undertaking, agency workers should have a right to ‘request’ a contract with the undertaking and workers on ZHCs should have a right to ‘request’ a contract guaranteeing them the hours they have in fact worked.<sup>105</sup>

There is already a right to request flexible working,<sup>106</sup> which has minimal effect in practice because of its lack of teeth. The same fate awaits these proposals if enacted. Rights to request are only meaningful if the grounds upon which they can be refused are tightly circumscribed. A duty to consider the request ‘in a reasonable manner’ as envisaged by the Taylor Review will not achieve this. Agency workers and ZHC workers, dependent on the undertaking for which they work offering them work, are very unlikely to risk upsetting that undertaking by making a request which is likely to prove fruitless. Much stronger protection is required - for example, that the request can only be refused if the employer can show it cannot meet its business needs by such a contract.<sup>107</sup> Otherwise, the choice of agency workers and those on ZHCs is merely illusory.

## 5. TREATMENT OF ‘VOICE’

It is possible to discern at least four over-arching defects which permeate the Taylor Review’s analytical framework for ‘voice’. These are outlined here before turning to the specific proposals made in the review.

### *The four general defects of the Taylor Review*

There are at least four general defects which weaken the force of the specific proposals in the Taylor Review and point to the inadequacy of its recommendations. First and foremost, the Report makes no reference to fundamental human rights in international law that are binding on the United Kingdom in respect of its policies and practices on worker voice. This undermines the legitimacy of the proposals. These include binding instruments under the framework of the International Labour Organisation, the European Social Charter and the European Convention on Human Rights. We have already noted the ILO’s ‘decent work’ agenda, and its pillars of ‘social dialogue’ and fundamental rights and principles at work. In

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<sup>105</sup> Taylor Review n.1 above at 48.

<sup>106</sup> See s.80F ERA 1996.

<sup>107</sup> See the proposals of the Labour Party, summarised in Pyper and Brown, n.4 above, at 22.



the light of the ‘decent work’ agenda, the refusal to examine freedom of association, collective bargaining, and the right to strike seems to us to represent a staggering omission for an inquiry of this kind. It distorts the analysis of many of the core issues explored in the Review, such as zero hours contracts. It is impossible to understand the phenomenon of casualization, without locating that within a broader understanding of contracting practices. In turn, it is impossible to understand contracting practices without understanding the background changes in regulatory environment, including the decline of collective bargaining. That is the regulatory background to the exponential growth in standardised written contracts in employment relations. The omission also undermines the political credibility of the Review and its proposals.

Second, the Review Report makes only a brief and cursory reference to trade union representation through collective bargaining as a form of voice,<sup>108</sup> but fails to set out any specific proposals for enhancing legal support for collective bargaining. The paucity of this response is highlighted by the findings of the CAC in *Deliveroo* insofar as this demonstrates how precarious employment operates as a legal obstruction to potential representation in the workplace by a trade union.<sup>109</sup> The ‘gig’ economy cannot be so neatly severed from access to collective bargaining and action, which is supposed to be a fundamental human right. It is thus remarkable that a report of this nature, purporting to offer a serious contribution to public debate on ‘good work’, provides no data on trade union membership, collective bargaining coverage, the utilisation of the Schedule A1 recognition procedure by trade unions seeking collective bargaining rights, the number of working days lost to strike action, and the ‘representation gap’ between those workers who would like union representation and those workers for whom union representation is practically unavailable.

Third, the Report fails to elaborate on theoretical parameters for measuring ‘voice’ and the depth of worker participation. Participation in decision-making can be meaningful or nugatory, depending upon the design of participatory processes, the quality of worker representation, the scope of enterprise decision-making that is subject to worker influence, and so forth.<sup>110</sup> It is also difficult to see how measures to promote corporate transparency are a form

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<sup>108</sup> The Taylor Review n. 1 above at 52.

<sup>109</sup> See n.65 above.

<sup>110</sup> For an introduction to the significant literature on dimensions of ‘voice’, see Alan Bogg and Tonia Novitz, ‘Investigating “Voice” at Work’ (2012) 33 *Comparative Labor Law and Policy Journal* 324; and Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014).

of ‘voice’ at all, since what is envisaged is the one-way transmission of information to ‘stakeholders’ rather than the mandating of dialogue.

Finally, in fixing on the ‘British way’, the Report does not engage with extensive comparative material on the implementation of ‘voice’. The small number of footnote references in the Report do not indicate any engagement with this body of literature. This weakens the force of the proposals on information and consultation, and the failure to understand the symbiotic relationship between union structures and works councils in well-functioning systems such as the German co-determination system.<sup>111</sup> The German experience would suggest that it is not possible to design effective ‘works council’ institutions without considering how those institutions are supported by (sectoral) collective bargaining arrangements. This ‘dual channel’ approach ensures that distributive conflicts are mediated through trade unions and collective bargaining, enabling works councils to engage in trustful cooperation with employers. Trade union structures also provide an importance source of representational expertise for works councils. This means that there is a high degree of *de facto* integration, which (paradoxically) results from the functional and institutional separation of different representational mechanisms.

*The limited utility of revised trigger requirements for the Information and Consultation of Employees Regulations 2004 (ICER)*

In relation to the specific proposals, the Taylor Review proposes a relaxation of the ‘trigger’ requirements under ICER that are necessary for ‘employees’ to initiate the negotiation process for an information and consultation procedure in undertakings of 50 or more employees.<sup>112</sup> The current level in the Regulations specifies that at least 10% of employees (and a minimum of 15) are required to initiate the process (though the process can also be triggered by management). The Report states that ‘as a result’ of these thresholds, the impact of ICER has been very small. To this end, the report proposes reducing the threshold to 2% of the workforce, and for the number to include ‘workers’ in its calculation. We acknowledge that this is an

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<sup>111</sup> Wolfgang Streeck, ‘Works Councils in Western Europe: From Consultation to Participation’, in Joel Rogers and Wolfgang Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (University of Chicago Press, 1995) 316.

<sup>112</sup> The Taylor Review n. 1 above at 52 – 53.

important first step in promoting the wider use of the ICER mechanism by more workers, and it is a proposal that is supported by some of the academic literature.<sup>113</sup>

Unfortunately, the Taylor Review provides no supporting evidence for its claim that the low penetration of ICER is ‘as a result’ of the numerical thresholds. Once again, none of the existing research on ICER is referenced or discussed in the Review.<sup>114</sup> A more likely explanation for the failure to trigger ICER is a lack of knowledge about the existence of the legal procedures, especially in non-unionised workplaces. This will not be addressed by modifications of the thresholds. In our view, it would be better to focus reform proposals for ICER on enhancing transparency. For example, the employer could be placed under a legal obligation to inform its workforce of the ICER procedure on a regular basis. It would also be possible to give independent trade unions a freestanding right to ‘pull’ the ICER trigger on behalf of the workforce, as under the German codetermination system.<sup>115</sup> This could provide trade unions with an organisational opportunity to use ICER more effectively as an organisational resource. In turn, the quality of consultation procedure is likely to be enhanced where trade unions provide independence and expertise to the negotiation of consultation arrangements.<sup>116</sup> The ‘employer size’ threshold of ‘50 employees’ threshold could also be reduced, and aligned with the ‘21 worker threshold’ that currently exists under the legal machinery for union recognition under Schedule A1. There would seem to be no good reason for maintaining any difference between ICER and Schedule A1

Chapter 7 of the Taylor Review contains no discussion of the quality of consultative voice emerging under ICER, especially in relation to ‘pre-existing agreements’ which may be introduced by employers to pre-empt the operation of the more substantive rights in the ICER framework. Nor does the Review discuss the ways in which ICER might be reformed to promote the deeper integration of union governance structures into the operation of ICER, for example by conferring preferential rights of access for unions with a specific level of support

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<sup>113</sup> K.D. Ewing and G.M. Truter, ‘The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy’ (2005) 68 *Modern Law Review* 626.

<sup>114</sup> It is not that the research does not exist. See, e.g., Mark Hall et al, ‘Trade Union Approaches towards the ICE Regulations: Defensive Realism or Missed Opportunity?’ (2015) 53 *British Journal of Industrial Relations* 350.

<sup>115</sup> See Bernd Waas, ‘System of Employee Representation at the Enterprise: Germany’ in Roger Blanpain et al, *System of Employee Representation at The Enterprise* (2012) 81 *Bulletin of Comparative Labour Relations*.

<sup>116</sup> Simon Deakin and Aristeia Koukiadaki, ‘Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from U.K. Case Studies’ (2012) 33 *Comparative Labor Law and Policy Journal* 427.

in the workplace.<sup>117</sup> This integration has been a crucial determinant of success in the German context.<sup>118</sup> In this respect, there was scope for policy complementarity with the proposals for sectoral collective bargaining in the Labour Party Manifesto. Unfortunately, this opportunity for a creative engagement across the political divide was missed by the Taylor Review. We can only speculate on why that might be.

*The absence of analysis of trade union representation*

It has already been noted that the Taylor Review made no reference whatsoever to the legal framework of collective bargaining and the right to strike, especially in the light of restrictive reforms of strike law introduced in the Trade Union Act 2016.<sup>119</sup> The best explanation that can be gleaned is in a journalistic apologia from Taylor in *The Guardian* following the Report's publication, where he justified the omission of specific proposals on trade union law reform in the following way: 'it would meet opposition from the government and business community, and scepticism from the public, but also because fewer than one in 40 young private-sector workers chooses to belong to a union.'<sup>120</sup>

This sits uneasily with Taylor's laudation of the independence of the review from Government influence and pressure in his 'Foreword by Matthew'.<sup>121</sup> It also fails to engage with a significant body of literature on the causes of union decline, including a hostile legal framework and public policy; and the positive role that well-designed legal interventions can have in reversing that decline.<sup>122</sup> It has been well-understood since Donovan that union recognition operates as an inducement to union recruitment, and that union recognition depends upon a supportive legal and public policy environment. Unfortunately, Taylor did not have the benefit of its own Research Papers. Nevertheless, it is a pity that the Review did not look back at George Bain's excellent research paper for Donovan.<sup>123</sup> The absence of any evidence on the

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<sup>117</sup> See P.L. Davies and Claire Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *ILJ* 121

<sup>118</sup> Rogers and Streeck n.111 above at 6.

<sup>119</sup> See Ford and Novitz; also Bogg above at n.25.

<sup>120</sup> <https://www.theguardian.com/commentisfree/2017/jul/20/review-gig-economy-gradual-change-quick-fixes-workers-unions> accessed 26 September 2017.

<sup>121</sup> The Taylor Review n.1 above at 4.

<sup>122</sup> For a recent discussion, see K D Ewing and John Hendy QC, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *ILJ* 23.

<sup>123</sup> George Sayers Bain, *Trade Union Growth and Recognition* (HM Stationery Office, 1967).

union representation gap undermines the short arguments set out in the journalistic addendum. The crucial data is surely not how many young persons *are* members of a trade union, but how many young persons would *want* to be a member of a trade union if the opportunity was realistically available.

Interestingly the Taylor Review contains brief proposals for ‘sectoral’ strategies to address low pay and poor working conditions in particular sectors.<sup>124</sup> While the Report favours new jargon (‘sector-specific codes of practice’), these age-old ills would be amenable to sectoral collective bargaining and wages councils with a statutory underpinning. This would of course open up an uncomfortable public conversation about the balance of power that facilitates exploitation and abuse in labour markets. Such a conversation might be one that would, in Taylor’s words, ‘meet opposition from the government and business community’. It is nevertheless critical to a balanced debate about vulnerability to abuse and exploitation, and effective methods for tackling it. The promotion of effective sectoral strategies would also require an overhaul of UK strike law, in particular the ban on secondary industrial action which constitutes a clear and ongoing breach of international law.<sup>125</sup> This would offer workers vastly more choice and voice than that currently envisaged by the Taylor Review.

## 6. CONCLUSION

### VLADIMIR:

Let us not waste our time in idle discourse! (*Pause. Vehemently.*) Let us do something, while we have the chance! It is not every day that we are needed. Not indeed that we personally are needed. Others would meet the case equally well, if not better. To all mankind they were addressed, those cries for help still ringing in our ears! But at this place, at this moment of time, all mankind is us, whether we like it or not. Let us make the most of it, before it is too late!<sup>126</sup>

The real value of the Taylor Review should have been the provision of rigorous evidence-based policy reasoning to inform that wider deliberative conversation. Unfortunately, the opportunity was not taken and we are left ‘waiting for Godot to come’.<sup>127</sup> Worse still, this is a dangerous document. It is methodologically unsound. Its proposals are often based upon simplistic understandings of the relevant law. Most of the discussion appears to be completely detached

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<sup>124</sup> The Taylor Review n. 1 above at 108.

<sup>125</sup> See Ewing and Hendy n. 122 above.

<sup>126</sup> Samuel Beckett, *Waiting for Godot*, Act II.

<sup>127</sup> *Ibid.*

from any consideration of the relevant academic literature on the regulation of work. As we have sought to demonstrate, Taylor's Report makes highly problematic recommendations, none of which tackle in any meaningful sense emergent British business practices. Their implementation through legislative enactment would worsen the position of the most vulnerable workers, not improve it.

While purporting to offer choice for workers in a variety of ways, which do not have a negative impact on business, little genuine opportunity is to be given to those at work to improve their situation. Employment promotion is emphasized at the expense of enforcement of labour rights, access to fair wages, job security and other basic entitlements. Scope for worker participation which might voice opposition to unfair working practices is limited to limited technical changes to ICER, rather than fundamental reforms which would comply with international human rights standards, promoting genuine social dialogue in line with decent work. This would need to begin with the immediate repeal of the Trade Union Act 2016.

If the Taylor Review's 'good work' is not to match international standards of 'decent work', then we seem destined for a post-Brexit retraction of basic employment rights. Indeed, this is indicated in the report by the treatment of, for example, rolled up holiday pay and pregnant workers. It is also insulated from comparative examples of successful regulatory practices. A more sustainable set of solutions must be sought elsewhere, possibly through the courts, as in the recent *UNISON* decision.<sup>128</sup> or under a new government with very different political inclinations.

The Taylor Review represents a missed opportunity, and a betrayal of the legitimate hopes of British workers for a serious public conversation about the determinants of decent work. Having disappointed those who eagerly awaited its arrival, the best that can be hoped for is that the Review will disappear into obscurity, overtaken by political events surrounding Brexit and outpaced by a judiciary that uses its independence courageously. The enormity of what lies ahead for us has scarcely been acknowledged.

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<sup>128</sup> *UNISON* n.13 above.